Charriah v Hauksson
2017 NY Slip Op 32615(U)
November 17, 2017
Supreme Court, Kings County
Docket Number: 510019/16
Judge: Larry D. Martin

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 17th day of November, 2017.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

CAROLINE CHARRIAH,

Plaintiff,

-VS-

INDEX No. 510019/16

REYNIR HAUKSSON and GRACIELA M. TEDIS,

Defendants.

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Cross Motion and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3
Reply Affidavit (Affirmation)	4

Upon the foregoing papers, plaintiff Caroline Charriah ("plaintiff") moves for an order, pursuant to CPLR § 3212, granting her summary judgment on the grounds that she sustained a serious injury under the 90/180 category of the New York Insurance Law § 5102 (d)[1] (the "Insurance Law").

Plaintiff commenced the instant action to recover compensatory damages for injuries she allegedly sustained on March 21, 2014, when a vehicle she was a passenger in was rear-ended (the "subject accident") by a vehicle owned and operated by defendants Reynir Hauksson and Graciela M. Tedis ("defendants").

[1] Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In the verified bill of particulars, plaintiff asserts, inter alia, that she sustained a herniated disc at the C3-C4 level, a bulging disc at the C5-C6 level, an epidural injection at the C6-C7 level, 14 trigger point injections to the cervical spine, aggravation/exacerbation of pre-existing and degenerative conditions in the cervical spine, cervical sprains and strains, decreased range of motion ("ROM") of her cervical spine; as well as L5-S1 disc space narrowing with disc herniation, 3 epidural injections to the lumbar spine, 25 trigger point injections to the lumbar area, aggravation/exacerbation of pre-existing and degenerative conditions in the lumbar spine, lumbar sprains and strains, and decreased ROM of her lumbar spine.

Based upon a review of the record submitted by the parties and the applicable law, the Court finds that plaintiff has met her initial prima facie burden of demonstrating that she sustained a serious injury under the 90/180 category of the Insurance Law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). In support of her motion, plaintiff submits, among other things, her affidavit, a physician's affirmation from her treating physician, Dr. Miriam Kanter ("Dr. Kanter"), copies of reports from her physiatric treatment with Dr. Kanter, disability notes authored by Dr. Kanter, and a copy of payroll and attendance records from her employer.

In her affidavit, plaintiff asserts that she was a traffic enforcement agent at the time of the subject accident and was out of work for one year as a result of the injuries she sustained (Plaintiff's Notice of Motion, exhibit A, 1-2). She further asserts that following the subject accident she underwent therapy four times per week from March 28, 2015 through March of 2015 (*id.* at 2). According to plaintiff, she received trigger point injections to her neck and back on 37 occasions and epidural steroid injections on three occasions (*id.* at 2). Plaintiff further asserts, among other things, that following the subject accident she wore a back brace for six months, she was "unable to drive

for [six] months due to the pain and limitation of movement in [her] neck and back" and she "couldn't clean [her] house as [she] couldn't wash the floors, bend down, lift heavy things, or carry the laundry to and from the machine" (*id.* at 3). In addition, plaintiff admits in her affidavit that she was involved in prior accidents where she sustained injuries (*id.*). However, plaintiff asserts that "at the time of [the subject accident] those injuries had been resolved and [she] was not treating with any medical provider for those injuries" and that she "was working full time as a traffic enforcement agent with no difficulties" for one year prior to the subject accident (*id.*).

Plaintiff's assertions are corroborated by the affirmation and reports from Dr. Kanter. In her affirmation, Dr. Kanter states that she initially examined plaintiff on March 28, 2014, at which time plaintiff displayed, among other things, weakness in the entire left upper extremity and decreased range of motion in the cervical and lumbar spine" (*id.* at exhibit E, ¶¶ 4-6). At this initial evaluation, Dr. Kanter diagnosed plaintiff with cervical and lumbar radiculitis and recommended that plaintiff undergo physical therapy treatment and trigger point injections (*id.* at ¶7). Thereafter, Dr. Kanter examined plaintiff on April 14, April 28, June 11, July 15, August 25, October 3 and November 12, 2015, as well as on January 7, February 13, February 25 and April 17, 2015. Based upon her treatment, Dr. Kanter noted that plaintiff had ongoing neck and lower back pain, reduced ROM in her cervical and lumbar spine, decreased mobility and endurance, all of which "resulted in limitations in [plaintiff's] ability to return to work and in her activities of daily life" (*id.* at ¶ ¶11-12). Ultimately, Dr. Kanter opined to a reasonable degree of medical certainty that "[plaintiff] was totally disabled from her activities of daily living and from her work as a traffic officer from March 21, 2014 until March 16, 2015 due to the injuries sustained in the [subject accident]" (*id.* at ¶ ¶ 15-16). Plaintiff

also proffers numerous letters from Dr. Kanter concerning her disability during the above-mentioned one-year time period, in which Dr. Kanter writes that plaintiff was totally disabled and unable to return to work (*id.* at exhibit H, Disability Letters). According to Dr. Kanter's notes, plaintiff was cleared to return back to work on March 16, 2015 (*id.* at exhibit H, Disability Letter dated February 25, 2015).

Based upon the above, the Court finds that plaintiff has made an initial prima facie showing of her entitlement to judgment as a matter of law (*see Peplow v Murat*, 304 AD2d 633, 633 [2d Dept 2003]; *Kaplan v Gak*, 259 AD2d 736, 736 [2d Dept 1999]; *De Araujo v Stem Cab Corp.*, 207 AD2d 823, 823 [2d Dept 1994]; *cf. Licari v Elliott*, 57 NY2d 230, 238 [1982]).

In opposition, defendants proffer a copy of the transcript of plaintiff's deposition, which was taken on January 4, 2017, as well as affirmed reports of independent medical examinations ("IMEs") conducted by orthopedic surgeon Dr. Joseph C. Elfenbein ("Dr. Elfenbein"), neurologist Dr. Chandra M. Sharma ("Dr. Sharma") and radiologist Dr. George J. Cavaliere ("Dr. Cavaliere"). The Court notes Dr. Cavaliere's finding of longstanding degenerative changes (Defendants' Affirmation, exhibit D), as well as Dr. Elfenbein's finding of a "contributing prior back injury as a result of a prior accident in December 2009" (*id.* at exhibit B, 6). Based on the findings from their respective IMEs, Dr. Elfenbein and Dr. Sharma opined that plaintiff's alleged cervical and lumbar injuries had resolved and no objective orthopedic or neurologic disability existed. However, the experts failed to address plaintiff's condition during the 90/180 time period (*see Negassi v Royle*, 65 AD3d 1311, 1311-12 [2d Dept 2009]; *Rahman v Sarpaz,* 62 AD3d 979, 979-80 [2d Dept 2009]; *Scinto v Hoyte*, 57 AD3d 646, 647 [2d Dept 2008]). Moreover, defendants' experts failed to address plaintiff's

claims of exacerbation of preexisting injuries and degenerative conditions (*see Pero v Transervice Logistics, Inc.*, 83 AD3d 681, 681 [2d Dept 2011]). As such, the Court finds that defendants have failed to submit sufficient evidence in admissible form to raise a triable issue of fact as to plaintiff's 90/180 claim.

Accordingly, the Court grants plaintiff's motion for summary judgment on her claim under the 90/180 category of the Insurance Law only. The foregoing constitutes the decision and order of the Court.

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HON. LARRY D. MARTIN
J.S.C.
HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT